IN THE HIGH COURT OF BOMBAY AT GOA.

CIVIL APPLICATION (REVIEW) NO. 7 OF 2002.
IN
CIVIL REVISION APPLICATION NO. 21 OF 2002.

1. Shri Toru Honu Naik (now deceased) through his legal representatives:
1a. Shivanand Toru Naik
1b. Pracash Toru Naik
1c. Sunita Shivanand Naik
1d. Mali Pracsk Naik
2. Smt. Tulsi Naik, widow of Toru Naik, all residing at H.N. 291, Madlo Wado, Dhaklem Bhat, Dongori, Ilhas Goa. ... Applicants.

Versus

Smt. Gopiki Fondu Naik, now deceased through her legal representative:
1(a) Master Janu Naik through guardian Narayan Naik, r/o Mandur, Ilhas Goa. ... Respondent.

Mr. M.B. D'Costa with Mr. J.A. Lobo, Advocates for the Applicants.

Mr. Irshad Aga, Advocate for the Respondent.

Coram: P.V. HARDAS, J.

Date: 17th August 2002.

ORAL JUDGMENT.

By consent, this application is taken up for final hearing.

This application for review has been filed by the respondents in Civil Revision Application No. 21 of 2002, seeking to review the Order of this Court dated 7th March 2002. By the said Order dated 7th March 2002, the learned Single Judge of this Court had quashed and set aside the Order dated 14th June 2001 passed by the learned trial Court, answering the

preliminary issue in favour of the present applicants in the Review Application.

2. I have heard Mr. D'Costa, learned counsel appearing for the present applicants/original respondents in Civil Revision Application No. 21 of 2002. The learned counsel for the applicants has urged before me that there is an error apparent on the face of the record and the Order of this Court dated 7th March 2002 needs to be reviewed.

3. It appears that the present respondent had filed an application for amendment of the plaint for incorporating a prayer for mandatory injunction directing the defendants to demolish the newly constructed house. By virtue of paragraph 15-A, the plaintiff had contended that the construction of the suit house had been completed. The present applicants, it appears, had filed an application seeking better particulars in respect of the statement of the plaintiff that the construction had been completed. The learned trial Court allowed the amendment application but, however, dismissed the application for better particulars. The present applicants had filed Civil Revision Application No. 45 of 1999, which was dismissed by this Court by its Order dated 30th March 1999, holding that the amendment was properly allowed

by the learned trial Court and no case for interference was made out. It appears that the present applicants had also filed Civil Revision Application No. 44 of 1999 challenging the dismissal of their application for better particulars. The said Civil Revision Application was disposed of by the learned Single Judge of this Court by Order dated 30th March 1999. While disposing of the said Civil Revision Application, the learned Single Judge has observed thus:-

> "...It would be better if in the application for better particulars the respondents had specifically pleaded the year in which the construction was completed. The year should be intimated to the petitioners/defendants within a period of eight days from today.
>
> 2. If the question of limitation arises because of the specific statement about the year of completion of the house, the defendants/petitioners will be at liberty to plead the question of limitation by suitable amendment in the Written Statement, which should be done within one week thereafter. However, no other amendment should be allowed in the Written Statement on the ground of supply of better particulars as directed above. Application disposed of accordingly."

4. The present respondent had disclosed the year of construction and, accordingly, it was urged before the learned trial Court that a preliminary issue in respect of limitation be framed. It appears that the learned trial Court did not frame a preliminary

issue on the point of limitation and, therefore, the present applicants had filed Civil Revision Application No. 16 of 2000, which was allowed by a learned Single Judge of this Court by Order dated 10th March 2000. The learned Single Judge, therefore, directed the learned trial Court to frame a preliminary issue on the question of limitation and decide the same in accordance with law.

5. The learned trial Court, it appears, framed a preliminary issue and held that the prayer for mandatory injunction was barred by limitation. The present respondent, therefore, preferred Civil Revision Application No. 21 of 2002 in this Court. The learned Single Judge of this Court by his Order dated 7th March 2002 allowed the Civil Revision Application and quashed and set aside the Order of the learned trial Court holding the relief of mandatory injunction be be barred by limitation.

6. Mr. D'Costa, the learned counsel appearing for the present applicants, has urged before me that the learned Single Judge while deciding Civil Revision Application No. 21 of 2002 did not take into consideration the earlier Orders passed by the learned Single Judges in Civil Revision Application Nos. 44 of 1999 and 16 of 2000. According to the learned counsel

for the present applicants, the amendment incorporating the prayer for mandatory injunction was allowed subject to the question of limitation and, therefore, this Court had directed the framing of a preliminary issue on the question of limitation. Therefore, according to the learned counsel for the applicants, this Court, while deciding Civil Revision Application No. 21 of 2002, was only concerned with the question whether the prayer for mandatory injunction was within limitation and was not concerned with the correctness of the proprietary of filing an application for amendment incorporating the prayer for mandatory injunction.

7. I have heard Mr. Aga, learned counsel appearing for the respondent. According to the learned counsel for the respondent, the Order of the learned Single Judge of this Court, while dismissing the challenge to the amendment at the behest of the present applicants in Civil Revision Application No. 45 of 1999, has no where stated that the amendment is allowed keeping the question of limitation open. He has further urged before me that the learned Single Judge, while deciding Civil Revision Application No. 44 of 1999 directing the present respondent to furnish better particulars, has kept the question of limitation open on such disclosure of the date. It was urged before me that since the amendment was allowed without reserving

the question of limitation, the amendment has the effect of relating back to the date of filing of the suit. This is precisely, according to the learned counsel for the respondent, what the learned Single Judge had taken into consideration while deciding Civil Revision Application No. 21 of 2002, the decision of which is sought to be reviewed.

8. The present respondent was allowed to amend the plaint by incorporating the prayer for mandatory injunction. A perusal of the Order of the learned Single Judge of this Court, by which the Civil Revision Application challenging the amendment was dismissed, does not disclose that the amendment was allowed subject to the question of limitation. However, the question of limitation was kept open on the disclosure of the date of construction by the present respondent. It would thus mean that if the date of construction was more than 3 years prior to the date of filing of the suit, the prayer for mandatory injunction would be barred by the period of limitation. If an amendment to a pleading is allowed, it has the effect of relating it back to the date of presentation or filing of the pleading. The date as disclosed by the present respondent was within the period of limitation from the date of filing of the suit. A perusal of the Orders of this Court in the various Civil Revision Applications

would show that this Court has not kept the question of limitation open while allowing the amendment.

9. In view of this, I do not find any error apparent on the face of the record which would justify interference for reviewing the Order of the learned Single Judge dated 7th March 2002. This Review Application is, therefore, devoid of any substance and deserves to be dismissed.

10. Civil Application (Review) is, accordingly, dismissed with no order as to costs.

(P.V. HARDAS)
JUDGE.

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